LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
DEC 1 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

Number 670

JOHN LESTER ELLENBURG AND
BEN EDELSTEIN,

Petitioners

vs.

THE STATE OF GEORGIA,

Respondent

SUPPLEMENTAL BRIEF ON BEHALF OF PETITIONERS IN CERTIORARI

WESLEY R. ASHCRAFT
Attorney for Petitioners
419 Atlanta National Building
Atlanta, Georgia 30303

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

Number 670

JOHN LESTER ELLENBURG AND
BEN EDELSTEIN,

Petitioners

VS.

THE STATE OF GEORGIA,

Respondent

SUPPLEMENTAL BRIEF ON BEHALF OF PETITIONERS IN CERTIORARI

Now comes JOHN LESTER ELLENBURG and BEN EDELSTEIN, Petitioners in Certiorari, and files this supplemental brief, and shows:

AUTHORITY FOR FILING SUPPLEMENTAL BRIEF

This supplemental brief is filed in accordance with Rule 24 (4) of the Supreme Court Rules authorizing the filing of a reply or supplemental brief.

REASON FOR FILING SUPPLEMENTAL BRIEF

The original certified record of the Georgia Court of Appeals showed that the Court of Appeals of Georgia entered no opinion upon denial of the motion for rehearing. The petition for certiorari was presented in that light.

Now, upon request of counsel for the State of Georgia, the Clerk of the Court of Appeals of Georgia has forwarded to this Court a supplementary certificate dated October 26, 1966, together with an additional opinion of the Court of Appeals on motion for rehearing to that Court.

The Clerk of the Court of Appeals now certifies that the material was inadvertently overlooked when the certified copy of the record in this case was prepared. He further certifies that the two paragraphs of the record certified to by him "were *published* by the Court on May 4, 1966, at the time the motion for rehearing was denied."

Petitioner's supplemental brief will be addressed to this specific question.

ARGUMENT ON SUPPLEMENTED RECORD

The Clerk of the Court of Appeals of Georgia now certifies that the opinion of the Court of Appeals on rehearing was *published* by the Court. However, the heading of the opinion is as follows:

"ON MOTION FOR REHEARING

(Not to be published)"

Counsel for Petitioners must confess that they are at a

loss as to the proper interpretation of such an order. When we first received it from the Court of Appeals with the notation thereon "not to be published" we took it to be a mere memoranda from Court to counsel. When the Clerk of the Court of Appeals certified the entire record from that court, he apparently interpreted it the same way, since it was not included in the record certified to by him. Now counsel for the State of Georgia seeks to have it made a part of the record so that an order for it to be not published now appears to have been published.

However, whether published, unpublished, private memoranda or public record, the additional opinion can lend nothing to the constitutional questions involved in the case at bar except to serve as a reminder that the courts of Georgia are still refusing to pass on constitutional issues whenever possible.

GIST OF ADDITIONAL OPINION

The Court of Appeals, in denying rehearing, stated that appellants were seeking to raise questions in addition to that which they argued on the appeal and which the Court answered in the opinion. The Court of Appeals then quoted from appellants' original brief, wherein the statement was made that

> "The appellants in this case are content to base their case in this Court on the one main proposition contended all throughout the trial of the case in the Criminal Court and in the Superior Court on certiorari, to-wit: THAT IT WAS ISSUED FOR ARTICLES NOT PROVIDED FOR BY STATE STATUTE."

Because of the foregoing excerpt taken from one of the briefs filed by counsel for petitioners in the Court of Appeals the State of Georgia will now seek to wash away any attempt to safeguard the constitutional protection to which a defendant in a criminal case is entitled. Such an excerpt, taking the form of a solemn judgment of the highest court of the State entitled to pass on the question, is being used by the State of Georgia to frustrate the petitioners in their attempt to have this important constitutional question decided on its merits and to thwart this Court from deciding such issue.

It is true enough that counsel for petitioners were content to *"base"* their case on one *"main proposition"* in the Court of Appeals. Nowhere, however, does it appear that the constitutional questions here urged were ever *"abandoned"* or *"waived"* by counsel. The record filed in this Court shows that the constitutional issues were presented to the trial court and were expounded at length at that time. They were preserved in the Superior Court by specifically urging them in the petition for certiorari to that court. They were also preserved in the enumeration of errors to the Court of Appeals by a general assignment of error.

The Georgia Court of Appeals has here attempted to assert a non-federal procedural ground as a basis for failing to decide a federal question. The question is, therefore, whether the state ground for the Georgia court's refusal to consider the constitutional question is *adequate*. See: *Wright* v. *State of Georgia*, 373 U.S. 284 (83 S. Ct. 1240), holding as follows:

> "Thus the holding of the Georgia court must not have been that the petitioners *abandoned* their argu-

ment but rather that the argument could not be considered because it was not explicitly identified in the brief with the motions for new trial." (italics added)

In deciding the State ground to be inadequate in that case, this Court then went on to hold:

"Its inadequacy is especially apparent because no prior Georgia case which respondent has cited nor which we have found gives notice of the existence of any requirement that an argument in a brief be specifically identified with a motion made in the trial court."

In the case of *Staub* v. *Baxley,* 355 U.S. at 320 (78 S. Ct. at 281), from the Georgia Court of Appeals, it was held:

"To require her (petitioner), in these circumstances, to count off, one by one, the several sections of the ordinance would be to force resort to an arid ritual of meaningless form."

In *Davis* v. *Wechsler,* 263 U.S. 22 (44 S. Ct. 13), it was held:

"Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."

In *Ward* v. *Board of Commissioners of Love County,* 253 U.S. 17 (40 S. Ct. 419), the effect of such non-federal basis for denying federal rights was decided as follows:

> "It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-federal grounds of decision that were without any fair or substantial support * * * (for) if non-federal grounds, plainly untenable, may be thus put forward successfully, our power to review easily may be avoided."

In the more recent case of *N.A.A.C.P.* v. *Alabama*, 377 U.S. 292 (84 S. Ct. 1302) (1964), it was held:

> "The consideration of asserted constitutional rights may not be thwarted by simple recitation that there has not been observance of a procedural rule with which there has been compliance in both substance and form, in every real sense."

Under Georgia procedure, briefs of the parties in the appellate court are not a part of the record. The question for decision by the appellate court is made by the enumeration of errors. In this case, the enumeration of errors was sufficient to raise every question decided by the Superior Court of Fulton County in overruling the petition for certiorari.

In conclusion, petitioners desire to point out to this Court that the serious constitutional questions should be passed upon. From the inception of this case in the trial court, where the trial judge fully expressed his dissatisfaction with the decisions of this Court on constitutional issues, to the Court of Appeals of Georgia, petitioners have been beset with all forms of procedural obstacles to prevent the questions from being properly answered.

Certiorari should be granted, and the validity of the search warrant explored.

Respectfully submitted,

WESLEY R. ASINOF
Attorney for Petitioners
419 Atlanta National Building
Atlanta, Georgia 30303